

THE CONSTITUTION OF MOTHERS: GENDER EQUALITY AND SOCIAL REPRODUCTION IN THE UNITED STATES AND THE WORLD

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One of the largest mobilizations in recent American history was the Women's March of 2017, with millions of participants in cities across the United States and in concurrent events throughout the world. Despite diverse backgrounds and agendas, the marchers unified around the general theme of equality for women.

It was a constitutional moment; the unity principles called for a new Equal Rights Amendment (ERA) to the U.S. Constitution.¹ The ERA is a proposed amendment to the U.S. Constitution that reads, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."² It was drafted and proposed in 1923, adopted by Congress almost 50 years later in 1972, and ratified by 35 states before the 1979 deadline for ratification. The deadline was extended to 1982 but no additional states took advantage of this extension.³ Once the deadline lapsed, the proposed amendment was three states short of the requisite three-fourths of the states required by Article V to amend the Constitution.⁴

In March of 2017, on the heels of the Women's March, the United States took a remarkable step towards constitutional change: Nevada became the first state to ratify the ERA—35 years after the 1982 deadline

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1. J. Bob Alotta et al. *Women's March on Washington, Guiding Vision and Definition of Principles*, 4 (Jan. 12, 2017), <https://www.womensmarch.com/principles>.

2. S.J. Res. 6, 115th Cong. (2017).

3. See MARJORIE SPRUILL, *DIVIDED WE STAND: THE BATTLE OVER WOMEN'S RIGHTS AND FAMILY VALUES THAT POLARIZED AMERICAN POLITICS* 280 (2017).

4. For accounts of the ERA's adoption and failure to be ratified by the requisite number of states, see MARY FRANCES BERRY, *WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION* (1986); JOAN HOFF-WILSON, *RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA* (1986); JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986); GILBERT Y. STEINER, *CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT* (1985).

had lapsed.⁵ If Nevada's ratification is legally valid, then the count is now 36 ratified states. Ratification by merely two additional states would be sufficient to add a sex equality guarantee to the U.S. Constitution. Nevada's ratification raises legal questions about the validity of a post-deadline ratification of a Congressionally-adopted constitutional amendment.⁶ If Nevada's ratification is a legitimate step towards achieving a valid constitutional amendment under Article V, and if this late ratification can be validated by a simple Congressional act removing the 1982 deadline,⁷ two additional states' ratifications will put the ERA in the U.S. Constitution.⁸ During 2017, the state legislatures of several unratified states, including North Carolina, Illinois, Virginia, and Florida, introduced or re-introduced bills to ratify the ERA. There is newfound political momentum around ERA ratification⁹ that makes it imaginable that the ERA will become part of the U.S. Constitution very soon.

This prospect raises deeper questions that I would like to explore in honor of Constitution Day. There are contested normative questions raised by this path towards constitutional change. If the ERA can be ratified with legal validity in 2017, the U.S. Constitution would adopt an amendment that was ratified by most of the states forty years ago, and initially drafted almost a century ago. Would we the people want such an amendment? Would it mean something different from what the framers and adopters intended? Should it mean something different from what its most vocal proponents are hoping to achieve? What, if anything, would the amendment change in the law, the lived experience of women and men, and gender relations in America of the twenty-first century? Would the ERA change what the law does to gender relations and gender equality—or would a constitutional guarantee of sex equality be merely symbolic today?

These questions matter because the status of women in American

5. S.J. Res. 16, 79th Sess. (Nev. 2017).

6. The Nevada legislature cited *Coleman v. Miller*, 307 U.S. 433 (1939) to support the validity of post-deadline ratification, urging that Congress could remove the ERA ratification deadline by legislation. Nev. S.J. Res. 16.

7. There are House and Senate bills that remove the deadline for the ERA's ratification. See H.R.J. Res 53, 115th Cong. (2017) and S.J. Res. 5, 115th Cong. (2017).

8. See Allison L. Held, Sheryl L. Herndon, & Danielle M. Stager, *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & THE LAW 113 (1997).

9. There have been ERA rallies, shout-outs by celebrities like Meryl Streep and Patricia Arquette in favor of the ERA, and a group called the ERA Coalition devoted to passage of the ERA. For an account of the current ERA revival, see Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J. L. & FEMINISM 381, 386-88 (2017).

society has changed radically for the better since the ERA was first drafted and introduced in Congress in 1923. Almost 100 years ago, the ERA was drafted and introduced on the heels of the women's suffrage amendment. The Nineteenth Amendment was added to the U.S. Constitution in 1920, however, women's rights activists believed that the Nineteenth Amendment right to vote regardless of sex was not sufficient to truly establish women as full citizens with equal rights. Women were still excluded from many professions, and had few opportunities to flourish outside of their roles as wives and mothers in the private domestic sphere. Alice Paul, perhaps the most well-known American suffragist, introduced the Equal Rights Amendment in 1923, which declared that women and men had equal rights and prohibited the denial or abridgment of those rights on grounds of sex.¹⁰ The ERA was consistently and regularly introduced to Congress, but it took almost 50 years for both houses of Congress to adopt it by a two-thirds majority as required by Article V.

Although 35 states ratified the ERA from 1972 to 1977, the effort to constitutionalize sex equality in the United States failed because of divisions within American legal feminism.¹¹ In 1923, when the ERA was introduced, the women who had fought together for women's suffrage could not unify behind the ERA. Florence Kelley, for instance, fought for woman's suffrage while tirelessly and successfully advocating for labor laws that protected women and children.¹² She headed the National Consumer League, for which Louis Brandeis authored the famous Brandeis brief in *Muller v. Oregon*.¹³ That brief, which largely shaped the Supreme Court's decision to uphold maximum hours legislation for working women, relied on sociological data about the detrimental effects of factory work on mothers.¹⁴ In the 1920s, social feminists like Florence Kelley supported laws that afforded special protections to mothers. They believed that special protection for mothers would pave the way to higher levels of labor and health protection for all. By contrast, ERA advocates like Alice Paul viewed special protections for women as anathema to their constitutional vision of sex equality.¹⁵ In 1923, the Supreme Court embraced the ERA feminists' skepticism of sex distinctions in the law,

10. See AMELIA R. FRY, CONVERSATIONS WITH ALICE PAUL: WOMAN SUFFRAGE AND THE EQUAL RIGHTS AMENDMENT 412 (1976).

11. For an excellent recent account of the divisions among American women, particularly regarding the relationship between women's rights and family values, see SPRUILL, *supra* note 3, at 12.

12. See NANCY WOLOCH, A CLASS BY HERSELF 12 (2015).

13. *Muller v. Oregon*, 208 U.S. 412 (1908).

14. *Id.*

15. See FRY, *supra* note 10.

citing the newly ratified Nineteenth Amendment. The Court invalidated legislation enacting a mandatory minimum wage for women in *Adkins v. Children's Hospital*.¹⁶ Citing *Lochner v. New York*, the Court determined that the Nineteenth Amendment required a retreat from its 1908 reasoning in *Muller*, which had upheld protective labor legislation for women:

In view of the great—not to say revolutionary—changes which have taken place since [*Muller*] . . . , in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point.¹⁷

The Court overruled *Adkins* in *West Coast Hotel v. Parrish*, upholding a statutory minimum wage for women based on *Muller*'s observation that "some legislation to protect [woman] seems necessary to secure a real equality of right."¹⁸ However, a larger battle between "equal rights" feminism and social feminism continued. Alice Paul had been an adviser to the employer in the *Adkins* case,¹⁹ and it was in the same year that *Adkins* was decided that the ERA she had drafted was introduced in Congress. Social feminists like Florence Kelley did not support the ERA and Eleanor Roosevelt, who championed human rights and the advancement of women, did not support the ERA, largely due to the framing of constitutional sex equality as incompatible with the protection of mothers.

This conflict took on new political dimensions when the ERA came closest to becoming law. Fifty years later, when Congress sent the ERA to the states for ratification, opposition to the ERA again focused on motherhood and whether constitutional sex equality would worsen the status of mothers. This opposition was led by Phyllis Schlafly, one of the most charismatic leaders of the conservative movement of the twentieth century, on the opposite end of the political spectrum from Florence Kelley. Kelley, after all, was strongly influenced by her encounters with the German social democratic party during her time studying abroad in the late nineteenth and early twentieth century.²⁰ Yet both Florence Kelley in the 1920s and Phyllis Schlafly in the 1970s opposed constitutional sex equality as framed by ERA proponents, from the standpoint of motherhood's special status.²¹ That convergence is quite remarkable. It is

16. *Adkins v. Children's Hospital*, 261 U.S. 525, 562 (1923).

17. *Id.* at 553.

18. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 395 (1937).

19. WOLOCH, *supra* note 12, at 128.

20. KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK* 95 (1995).

21. *Id.*

a reminder that, in order to succeed, the constitutional advancement of women's equality must address and engage motherhood and the problem of social reproduction across political divides.

Today's ERA proponents, such as Congresswoman Carolyn Maloney, its lead sponsor, focus on the issues like the persistence of unequal pay and the lack of strict scrutiny for sex-based distinctions in the law under the Equal Protection Clause.²² Other ERA advocates, such as the ERA Coalition, mention the persistence of pregnancy discrimination and the problems of work-family balance for women.²³ Consider the public discourse, including the words of a Nevada legislator in March 2017, as reported in a *New York Times* editorial following the Nevada ratification vote:

"This bill is about equality, period," said [Nevada] State Senator Pat Spearman, pointing to a raft of well-documented studies of continuing inequality. For example, the gap in earnings between women and men will not close until the year 2058, according to the Institute for Women's Policy Research. The percentage of impoverished women has increased in recent years, while only 5.8 percent of chief executives on the list of the Fortune 500 companies are women. Women account for just 19.4 percent of congressional seats now; it might take another century to raise that to 50 percent. The United States is ranked 45th in the 2016 Global Gender Gap of nations, below European nations, Belarus and Namibia, among others.²⁴

However, many scholarly commentators argue that we already have a de facto ERA because of the ways in which the failed amendment affected the subsequent development of equal protection, Title VII, and Title IX.²⁵ When the ERA was not ratified by enough states by the 1982 deadline, the amendment began to move out of the legal feminist

22. Carolyn B. Maloney, *Equal Rights Amendment*, <https://maloney.house.gov/issues/womens-issues/equal-rights-amendment> (last visited Oct. 19, 2017).

23. JESSICA NEUWIRTH, *EQUAL MEANS EQUAL: WHY THE TIME FOR AN EQUAL RIGHTS AMENDMENT IS NOW* (2015).

24. See Editorial Board, *Pumping Life into the Equal Rights Amendment*, N.Y. TIMES, Mar. 25, 2017, at SR8.

25. See, e.g., Mary Anne Case, *The Supreme Court Has Delivered on Many of the E.R.A.'s Promises*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/roomfordebate/2016/09/08/was-the-eras-defeat-really-a-loss-for-feminism/the-supreme-court-has-delivered-on-many-of-the-eras-promises>; David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476 (2001); Michael Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 985 (2002). Reva Siegel notes that the gender equality jurisprudence of equal protection, the so-called "de facto ERA," was shaped by both the goals of ERA proponents and by the countermovement that prevented the ERA's ratification. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

landscape. The passionate advocates of gender equality turned their attention to existing constitutional guarantees of equality, mainly the Equal Protection Clause, as well as statutory prohibitions of sex discrimination. To some degree, these alternative strategies were successful. The Supreme Court began to scrutinize and invalidate sex distinctions in the law by way of the Equal Protection Clause.²⁶ Twenty years ago, in *United States v. Virginia*, the Supreme Court invalidated a state's maintenance of an all-male military academy as sex discrimination in violation of equal protection.²⁷ Civil rights laws governing pay,²⁸ terms and conditions of work,²⁹ and educational opportunities³⁰ were adopted in the 1960s and 1970s. Since then, they have been interpreted as remedying many different forms of discrimination against women, and this has vastly widened women's access to educational and employment opportunities previously unavailable to them. Because of the ways in which the Equal Protection Clause evolved to include gender equality by judicial interpretation and because statutes did what the ERA advocates aimed to achieve through constitutional amendment, it is now sometimes said that a constitutional guarantee of sex equality would add nothing of legal significance and would be merely symbolic. Implicit in the characterization of ERA as merely symbolic is the sense that the monumental political effort required to achieve an Article V amendment would not be worth the prize.

However, the ERA, if adopted today in 2017, can be much more than a symbolic ratification of the progress made on legal sex equality to date. To contemplate a concrete and vivid picture of this potential, I believe that we as Americans can honor our Constitution on its birthday by engaging the best ideas produced by our constitutional peers. Constitution Day commemorates the day in 1787 that 39 men—our “founding fathers”—signed our nation's sacred foundational document 230 years ago. Since then, constitutionalism, pioneered by the United States and stemming from the Enlightenment, spread around the world and evolved to spawn

26. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating Idaho statute which preferred, among equally qualified administrators of an estate, males over females); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (invalidating federal statute that imposed greater burdens on female members of uniformed services proving dependent status of husbands than on male members proving dependent status of wives); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating a provision of the Social Security Act that awarded “mother's insurance benefits” only to widows, but not to widowers, upon death of working parent).

27. *United States v. Virginia*, 518 U.S. 515 (1996).

28. Equal Pay Act of 1963, 29 U.S.C. § 206 (1996).

29. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1991).

30. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1986).

more modern constitutions, which, by the twentieth century, were adopted by founding mothers as well as founding fathers. After global movements for women's suffrage in the late nineteenth and early twentieth centuries, the twentieth century constitutions that emerged in Europe after World War I and World War II included women in the constituent assemblies.³¹ Women contributed to the adoption of sex equality provisions similar to the ERA that we never got. Today, most constitutions around the world do explicitly guarantee women's equal rights;³² many also include clauses extending special protections to mothers.³³

Engaging global constitutionalism can shed light on why and how women constitution-makers envisioned the meaning of gender equality in twentieth and twenty-first century constitutions. Leading European constitutions include provisions guaranteeing special rights or protections based on motherhood. These motherhood provisions were introduced and defended by women constitution-makers, who believed that protecting motherhood was a way of reducing women's barriers to progress towards greater gender equality. Engaging these other constitutional traditions can help Americans imagine a different possible relationship between constitutional equality and motherhood protection: one of synthesis rather than conflict. Broadening our imagination by way of concrete examples of alternative paths is important because gender inequality still persists in the twenty-first century by way of women's economic disadvantage and political underrepresentation, despite the interventions of American sex discrimination law in constitutional Equal Protection jurisprudence and civil rights statutes.

The wage gap between men and women is significant; in the U.S., a woman makes 80 cents to the man's dollar.³⁴ Moreover, gender parity has not been achieved in representation or by participation in institutions that exercise economic and political power, whether it's Congress,³⁵ corporate

31. See UTE FREVERT, *WOMEN IN GERMAN HISTORY: FROM BOURGEOIS EMANCIPATION TO SEXUAL LIBERATION* 169 (1989); MOLLY TAMBOR, *THE LOST WAVE: WOMEN AND DEMOCRACY IN POSTWAR ITALY* 79 (2014); Assemblée Nationale, *Les 33 Femmes élues Députées Pour la Première fois en 1945*, http://www2.assemblee-nationale.fr/14/evenements/2015/les-femmes-deputees-depuis-1945#node_14429 (last visited Oct. 19, 2017).

32. See Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J.L. & GENDER 569, 578-79 (2014).

33. See Suk, *Global Constitutionalism*, *supra* note 9, at 401-02 (table showing European countries with clauses on sex equality, substantive sex equality, and motherhood protection).

34. See Bureau of Labor Statistics, Chart 1, *Women's Earnings, Women's Earnings as a Percentage of Men's, for Full-Time Wage and Salary Workers, 1979-2016 Annual Averages*, at 2 (August 2017), <https://www.bls.gov/opub/reports/womens-earnings/2016/pdf/home.pdf>.

35. Women currently make up 19.4% of the House of Representatives and 21% of the Senate. See, Rutgers Center for American Women and Politics, *Women in the U.S. Congress 2017*

boards,³⁶ or positions of responsibility in the workplace.³⁷ In the United States, some economists have studied the wage gap and have suggested that the gender gap is really a motherhood gap.³⁸ Mothers have lower wages than fathers who work, but women without children do about as well as men (with or without children). Prohibiting discrimination on the grounds of sex is inadequate to address the disadvantaging effects that raising children has on women. Sometimes, the enforcement of formal gender equality (that is, no use of sex categories in or by the law), can worsen, rather than alleviate, some of these burdens.³⁹

Even though the Equal Protection Clause has now been read to prohibit sex discrimination in most instances, and statutes prohibit sex discrimination in employment and education, American women continue to experience political and economic disadvantages that stem from their social role in raising the next generation of Americans. Is this a constitutional problem? In 1920, the U.S. was not the only country that constitutionalized women's right to vote. In Germany, the Constitution of 1919 was adopted right after women got the right to vote, and women were elected to the constituent assembly that adopted that constitution. That constitution included, for the first time, a clause guaranteeing the equal rights and responsibilities of men and women, as well as a clause entitling motherhood to the special protection of the state. Both clauses survived and were adopted in the German Basic Law that was adopted after World War II and is currently in force. Article 3.2 of the German

<http://www.cawp.rutgers.edu/women-us-congress-2017> (last visited Oct. 19, 2017).

36. On the boards of Fortune 500 companies, women hold 20.2% of board seats. *Deloitte, Missing Pieces Report: The 2016 Board Diversity Census of Women and Minorities on Fortune 500 Boards*, 10, <http://www.catalyst.org/knowledge/2016-catalyst-census-women-and-men-board-directors> (last visited Nov. 3, 2017).

37. Women hold 52% of all professional-level jobs, but only 14.6% of executive officer positions, 8.1% of top earners, and 4.6% of Fortune 500 CEOs. *Center for American Progress, Fact Sheet: The Women's Leadership Gap*, 1, <https://www.scribd.com/document/211083206/Fact-Sheet-The-Women-s-Leadership-Gap> (last visited Oct 19, 2017).

38. Marianne Bertrand, Claudia Goldin, and Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH, 12 (January 2009), <http://www.nber.org/papers/w14681.pdf>. See also, Francine D. Blau and Lawrence M. Kahn, *The Gender Wage Gap and Lawrence M. Kahn, The Gender Wage Gap: Extent, Trends, and Explanations*, THE NATIONAL BUREAU OF ECONOMIC RESEARCH, (Jan. 2016), <http://ftp.iza.org/dp9656.pdf>.

39. For an account of the dynamics by which the American commitment to gender-neutral family and medical leave can undermine efforts to address the needs of working mothers, see Julie C. Suk, *Are Gender Stereotypes Bad for Women?* 110 COLUM. L. REV. 1 (2010). A recent study by economists shows that gender-neutral family leave policies at universities have benefited men and have substantially reduced female tenure rates. See Heather Antecol, Kelly Bedard, & Jenna Stearns, *Equal but Inequitable: Who Benefits from Gender-Neutral Tenure Clock Stopping Policies?* INSTITUTE OF LABOR ECONOMICS (April 2016), <http://ftp.iza.org/dp9904.pdf>.

Constitution provides: “Men and women shall have equal rights.”⁴⁰ In 1994, a sentence was added to elaborate, “The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”⁴¹ Article 6.4 of the German Constitution provides: “Every mother shall be entitled to the protection and care of the community.”⁴² The equality and motherhood clauses, first introduced in 1919 in Germany, provided a template for many European constitutions of the twentieth century. The equal rights of women and men, and the motherhood protection clause, can also be found in the Preamble of the French Constitution of 1946⁴³ and the Italian Constitution of 1948.⁴⁴

These provisions did not begin as enforceable individual rights. These provisions were mechanisms to support political and social institutions as they adapted to the social and economic transformations that the World Wars accelerated. In the industrial economy, marriage, the family, and especially the caregiving role of mothers, constituted the infrastructure for the social reproduction of the nation. Women performed unpaid work in the home to raise the next generation of citizens and workers. Breadwinning male citizens performed market work and supported women and children. The economic and political order reproduced itself across generations by way of this division of roles. And, indeed, past exclusions of women from suffrage and from participation in political organizations enabled the continued operation of this particular infrastructure for raising the next generation. In Germany, regional laws prohibited women from attending meetings of political organizations from 1850 to 1908 and excluded them from economic life.⁴⁵ Similarly, in the United States, women were excluded from many professions, including the practice of law.

The U.S. Supreme Court upheld this exclusion as consistent with the Privileges and Immunities Clause in the 1872 case of *Bradwell v. State*.⁴⁶ These exclusions were not intended solely to denigrate women; they constituted the silent constitutional enforcement of a particular

40. GRUNDGESETZ [GG] [Basic Law], art. 3(2), (Ger.), translation at https://www.gesetze-im-internet.de/englisch_gg/.

41. *Id.*

42. *Id.* at art. 6(4).

43. 1958 CONST. Preamble of 1946 ¶ 11 (Fr.).

44. Art. 37 Costituzione [Cost.] (It.).

45. See KATHRYN KISH SKLAR, ANJA SCULER, & SUSAN STRASSER, SOCIAL JUSTICE FEMINISTS IN THE UNITED STATES AND GERMANY, A DIALOGUE IN DOCUMENTS 1885-1933, at 33 (1998).

46. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

infrastructure for social reproduction known as the “separate spheres” tradition—men engaged in wage work and voted, providing economic support and political representation on behalf of their wives who stayed home and raised the children. In Germany, after women got the vote, women constitution-makers secured a provision explicitly stating that “in principle, men and women have the same rights and obligations.”⁴⁷ In addition, they argued for other protections, including those for marriage, family, motherhood, and children born out of wedlock.⁴⁸ These provisions were efforts to sustain the existing infrastructure of social reproduction in light of the realities of women’s new contributions to economic life. Mothers still played the central and leading role in raising children, and the women constitution-makers wanted the constitution to explicitly acknowledge it. Protecting motherhood would allow women to raise their children even while working and performing the socially valuable, previously male tasks that they had begun to take on during wartime.⁴⁹ Women participated in market work during World War I. Provisions such as equal rights for women and men, women’s suffrage, spousal equality in marriage attempted to make the old infrastructure of social reproduction an equal one, one which was compatible with women’s entry into the public sphere. Hence, also, the Weimar Constitution also prohibited discrimination against women in the civil service⁵⁰ and the Italian constitution of 1948 guaranteed women equal pay for equal work.

Article 37 of the Italian constitution provides: “The woman worker has the same rights, and for equal work, and the same compensation, paid to male workers. The conditions of work must permit the fulfillment of her essential functions in the family and assures to the mother and to the child a special and adequate protection.”⁵¹ In the United States, by contrast, the Supreme Court has suggested that treating mothers better than fathers for purposes of parental leave is contrary to equal protection.⁵² In defending the commitment to gender neutrality in parental leave, Justice Ginsburg did not necessarily embrace formal sex equality as such, but rather raised concerns about the unintended consequences of protecting maternity.⁵³ If pregnant women get special accommodations or

47. Weimar Constitution, Aug. 11, 1919, art. 109 (Ger.).

48. *Id.* at art. 119 and 121.

49. See RENATE PORE, A CONFLICT OF INTEREST: WOMEN IN GERMAN SOCIAL DEMOCRACY, 1919-1933 (1981); RICHARD EVANS, THE FEMINIST MOVEMENT IN GERMANY, 1894-1933 (1976).

50. Weimar Constitution, *supra* note 47, at art. 128.

51. Art. 37 Costituzione [Cost.] (It.).

52. Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 754 (2003).

53. See *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 45 (2012) (Ginsburg, J., dissenting). For a discussion of Justice Ginsburg’s justifications for the gender-neutral approach to

paid maternity leave, whereas injured men and fathers do not, employers will have incentives to avoid hiring or including pregnant workers.⁵⁴ Equal Protection Section V doctrine now says that protecting motherhood, for instance, by affording generous maternity leaves without equivalent paternity leaves, amounts to gender stereotyping⁵⁵ that is ultimately detrimental to working women. From this constitutional mindset, it seems deeply paradoxical for so many European constitutions to guarantee sex equality and the special protection of mothers simultaneously.

At the same time, European constitutional orders, especially the German Constitutional Court over the last quarter century, have flagged the danger of disadvantaging working women in efforts to protect maternity. In the *Nocturnal Employment* judgment in 1992, the German Constitutional Court invalidated a statute prohibiting women's nighttime work.⁵⁶ The Court recognized that those seeking to justify the statute were concerned about the burdens of nighttime work for women engaged in child-rearing and housework during the day. At the same time, the Court noted that banning women's nighttime work would adversely affect women's employment opportunities and could reinforce women's role in child-rearing and housework.⁵⁷

Nonetheless, the German Constitutional Court has not invalidated all restrictions on mothers' work and, in fact, has indicated that some of these restrictions may be constitutionally required. In Germany, as in most other European countries, the maternity leave statute ("Mutterschutzgesetz") makes some portion of maternity leave compulsory for every new mother. In Germany, women may not return to work until eight weeks after the birth of the baby.⁵⁸ In 2006, the Constitutional Court held that the time spent on maternity leave should be counted as time worked for unemployment insurance purposes. In reaching this decision, the Court determined that mandatory maternity leave was constitutionally required

medical leave that encompasses pregnancy leave, see Julie C. Suk, "A More Egalitarian Relationship at Home and at Work": Justice Ginsburg's Dissent in *Coleman v. Court of Appeals of Maryland*, 127 HARV. L. REV. 473 (2013).

54. *Coleman*, 566 U.S. at 50 (Ginsburg, J., dissenting).

55. See *Hibbs*, 538 U.S. at 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.")

56. BVerfGE [Nocturnal Employment Decision], 1 BvR 1025/84, January 28, 1992, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/1992/01/rs19920128_1bvr102584.html. (Trans. Donald Kommers, German Law Archive), <http://www.iuscomp.org/wordpress/?p=79>.

57. *Id.*

58. Gesetz zum Schutze der erwerbstätigen Mutter [Mutterschutzgesetz - MuSchG] [Maternity Protection Act], Jan. 24, 1952, BGBl. I.S. at 69, (Ger.), <https://www.gesetze-im-internet.de/muschg/MuSchG.pdf>.

under Article 6.4's provision protecting motherhood.⁵⁹ Taking the requirements of motherhood protection along with Article 3(2)'s guarantee of equal rights for women and men, and the state's duty to implement equal rights and eliminate existing disadvantages, the Court concluded that the constitution required the state to compensate the disadvantages attributable to taking maternity leave.⁶⁰

Courts and legal actors in various settings have struggled with whether legal equality should mean sameness of treatment (with few exceptions), or whether it authorizes and sometimes requires different treatment, especially concerning mothers' distinctive role in biological and social reproduction. Assisted reproductive technologies are changing the boundaries of biological motherhood, as it is now possible for the genetic mother to be different from the gestating mother, while transformations in the economy and cultural norms over the last century have changed the boundaries of social motherhood. Mothers today are not always primary caregivers. Sometimes they are breadwinners, and the fathers act as primary caregivers. Same-sex couples also form families and allocate breadwinning and caregiving in a variety of ways. In an increasing number of households, each parent holds a full-time job making it difficult for any parent to fulfill the same primary caregiver functions that mothers performed when they were excluded from the public sphere.⁶¹

In the United States, there is a fear that protecting motherhood will ultimately undermine women's struggle for equal status. Conflicts growing out of this fear have shaped the horizons of women's constitutional equality for a hundred years. But it does not have to be that way. Recently, the courts in many European jurisdictions have read motherhood protection together with equality clauses to protect and enforce a gender-equal infrastructure for the raising of children.⁶² In Europe, twentieth century constitutions' protections of motherhood normalized the profoundly important expectation that the state become positively obligated to support pregnant women and the raising of children.

In recent years, the German legislature has attempted to implement the 1994 constitutional gender equality amendment that says, "The state

59. See BVerfG, *supra* note 56, at 1 BvL 10/01.

60. *Id.*

61. BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES SUMMARY (Apr. 20, 2017), <https://www.bls.gov/news.release/famee.nr0.htm>.

62. For a more extensive account of this jurisprudence and its interpretation as an infrastructure of social reproduction, see Julie C. Suk, *Global Constitutionalism*, *supra* note 9, at 426-29).

shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.”⁶³ One set of reforms introduces various policies designed to encourage fathers to partake in more caregiving, on the theory that the burdens of caregiving often fall on mothers resulting in disadvantages in the workplace. For instance, in Germany as of 2006, the amount of money available for any family childcare benefit is keyed to the salary of the parent taking the leave.⁶⁴ Because fathers typically have higher wages than mothers, this is clearly a nudge to fathers. The Federal Constitutional Court has upheld these initiatives as valid enforcements of the gender equality clause.⁶⁵ One way of understanding these developments is to look at how the constitutional protection of motherhood is now being expanded through the law of gender equality towards the constitutional protection of parenthood. However, unlike the American framework of gender-neutrality as the paradigm of constitutional sex equality, starting with motherhood protection leads to a different result. In the United States, gender equality without motherhood protection has meant treating mothers as ungenerously as one treats fathers. In Europe, by contrast, motherhood protections meant making sure that working mothers could work and raise children at the same time. Now, a more robust commitment to gender equality means making that same work-family balance available to both sexes, in recognizing that women and men both participate equally in market work and child-rearing. Thus, a new infrastructure of social reproduction can evolve to replace the one that relies on mothers’ exclusion or minimal involvement in the public sphere.

On Constitution Day, we should reflect not only on the 39 men who signed our sacred document, but also on what all constitution-makers aspire to accomplish. A constitution, by its very nature, outlasts its founders and drafters; it is concerned, explicitly or implicitly, with building a stable political order that continues beyond the lives of its founders. The polity endures by reproducing itself biologically and socially. Our founding fathers did not make social reproduction an explicit topic of constitutional concern but judges in the nineteenth century did by upholding the exclusion of women from certain professions. The

63. GRUNDGESETZ [GG] [Basic Law], art. 3(2), (Ger.), *translation at* https://www.gesetze-iminternet.de/englisch_gg/.

64. Gesetz zum Elterngeld und zur Elternzeit [Bundeselterngeld- und Elternzeitgesetz – BEEG] [Parental Allowance and Parental Leave Act], Dec. 5, 2006, BGBl I, at 2748, art. 1 (Ger.) https://www.destatis.de/DE/Methoden/Rechtsgrundlagen/Statistikbereiche/Inhalte/570_GEElterngeldElternzeit.pdf?__blob=publicationFile.

65. See BVerfG, *supra* note 56, at 1 BvR 2712/09.

exclusion of women from constitutional rights was an essential component of the social reproduction infrastructure for the American nation. Women could do the necessary work of running the home and raising children to ensure the nation's continuation because they were not preoccupied with market work or political participation.

Today, constitutional gender equality must be understood not only as women's rights, or the rights of men and women to be liberated from gender roles, but rather, as the new twenty-first century infrastructure of social reproduction. The twenty-first century economy depends on men and women participating in market work, and this in turn requires our social and political institutions to support the raising of children. This vision of gender equality, which was facilitated by the early twentieth century protection of motherhood in post-war European constitutions, is one that is taking hold in many other constitutional orders outside the United States. I hope that reflecting on these ideas will reinvigorate our commitment to realizing the ideals of equality and democracy that enabled the first Constitution Day in 1787.